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Joint written statement* submitted by International Federation for Human Rights Leagues, Tides Center Project International Network for Economic, Social and Cultural Rights (ESCR-Net), non-governmental organizations with special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Scope of the Legally Binding Instrument to Address Human Rights Violations Related to Business Activities

Context

In June 2014, the UN Human Rights Council (HRC) adopted Resolution 26/9 'to establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights'.[1] The mandate of this open-ended intergovernmental working group (OEIWG) 'shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[2]

Following the development of a new OEIWG the Corporate Accountability Working Group (CAWG) of the International Network for Economic, Social and Cultural Rights (ESCR-Net), together with the International Federation for Human Rights (FIDH), launched a joint two-year project called the 'Treaty Initiative' in January 2015. An Expert Legal Group (ELG) has been established to work with civil society in all global south regions to develop legal proposals that shape and influence the content of the new UN treaty.

The treaty initiative project facilitates effective partnerships between the ELG and civil society in the process of developing these legal proposals, ensuring they incorporate the perspectives of civil society, particularly those impacted by corporate related human rights violations. Overall the aim is to promote the perspective of affected people during the treaty development process. In order to achieve that the project will hold consultations in various regions of the world in 2015 and 2016 between the ELG and representatives of civil society. Legal proposals developed from the consultations will be submitted to the OEIWG.

The first two sessions of the OEIWG 'shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument'.[3] The OEIWG will have its first session during 6-10 July 2015 in Geneva.[4] Considering that the *scope* of the proposed treaty is likely to be one of the key issues debated/discussed during the first OEIWG session, this paper seeks to outline scope-related contentious aspects and develop potential options in consultation with civil society organisations (CSOs) so as to inform the OEIWG's mandate. In particular, the paper will articulate options which respond to the challenges highlighted during consultations by affected people and/or CSOs in holding companies accountable for human rights abuses[5] and what kind of the proposed international instrument could overcome those challenges.

Asia-Pacific consultation reaffirms regulatory gaps and the need for a treaty

The presentations made by CSOs and affected people, during the Asia-Pacific Consultation held in Chiang Mai (Thailand),[6] reaffirmed that voluntary and territorial regulatory initiatives often fail to encourage companies to comply

[1] Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (26 June 2014), para. 1, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

[2] Ibid.

[3] Ibid, para. 2.

[4] Human Rights Council, 'First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx.

[5] The consultations with CSOs and affected people are being organised by the project co-ordinators, ESCR-Net and FIDH. The first regional consultation for the Asia-Pacific was held in Chiang Mai during 1-3 May 2015 (the regional consultations for Africa and Latina America are planned for October 2015 and early 2016, respectively). The Chiang Mai consultation was followed by a Skype consultation – specific to issues related to the treaty's scope – with selected CSO representatives on 8 June 2015.

[6] ESCR-Net and FIDH, 'First regional consultation in Thailand, FIDH and ESCR-Net Treaty Initiative', 21 May 2015, http://www.escr-net.org/node/365947.

with their human rights responsibilities.[7] For example, in the Philippines, it is the government which is using a special paramilitary unit – Investment Defence Force – to secure large-scale development projects against resistance by displaced indigenous people.[8] On the other hand, in Bangladesh, two years after the Rana Plaza collapse, garment workers continue to experience intimidation for exercising their right to collective bargaining.[9]

CSOs also highlighted several challenges that they experienced in holding companies accountable for breaching human rights, e.g., lack of access to information (including about parent-subsidiary relations); unviable plans for relocation of project-displaced people; judicial process being long, expansive and prone to corruption; corporate influence over politics; international financial institutions pressuring states to create business-conducive environment; inadequate compensation to those affected; lack of transparency in state allocation of corporate contracts/licenses; intimidation and suppression of human rights defenders; green washing; lack of adequate environment impact assessment guidelines; complex corporate structures; corruption and conflict of interest; lack of legal aid; non-compliance with the 'free, prior and informed consent' principle.[10]

On account of these regulatory gaps and governance challenges, in a post- consultation Unity Statement, several CSO 'demand[ed] an end to the human rights violations perpetrated with impunity by TNCs and other business entities, often with the complicity or inaction of States'.[11] These CSOs also demanded that their governments 'protect, respect and fulfil human rights and commit to enact effective laws for corporate accountability' and 'actively participate in the development of a legally binding treaty on business and human rights in the UN Human Rights Council'.[12]

Twin scope-related aspects

There are two aspects related to the scope of the treaty: the types of companies to which the treaty should apply (the 'depth' question) and the types of human rights[13] that the treaty should cover (the 'breadth' question).

The twin scope-related aspects have a direct relation to the need for a treaty as a response to the inability of exiting regulatory initiatives, including the UN Guiding Principles on Business and Human Rights (GPs),[14] to fill governance gaps in the area of business and human rights.[15] In addition to challenges highlighted above, the GPs may, in particular, fail to enhance the regulatory efficacy in "hard cases", that is, situations in which a company sees no clear business case for complying with its human rights responsibilities and/or in circumstances in which states are unable or unwilling to regulate effectively the activities of private actors.[16]

The depth question revolves around the somewhat controversial 'footnote' in the HRC resolution, which reads: '"Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities,

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[7] ESCR-Net and FIDH, 'Shaping the treaty on business and human rights: views from Asia and the Pacific', 11 May 2015, http://www.escr-net.org/node/365922.

[8] Ibid. See also Human Rights without Frontiers et al., *Police in the Pay of Mining Companies: The Responsibility of Switzerland and Peru for Human Rights Violations in Mining Disputes* (December 2013).

[9] Ibid. See also Human Rights Watch, 'Bangladesh: 2 Years After Rana Plaza, Workers Denied Rights', 22 April 2015, http://www.hrw.org/news/2015/04/22/bangladesh-2-years-after-rana-plaza-workers-denied-rights.

[10] Author's personal notes taken during the Chiang Mai consultation.

[11] APWLD, 'Unity Statement: Asia Pacific Civil Society's Demands for the Legally Binding Treaty on Business and Human Rights', 19 June 2015, http://apwld.org/unity-statement-asia-pacific-civil-societys-demands-for-the-legally-binding-treaty-on-business-and-human-rights/.

[12] Ibid.

[13] For the purpose of this paper, the term 'human rights' is taken in a wider sense so as to include not only human rights, labour rights and environmental rights but also the specific rights of vulnerable sections of society such as women, children and indigenous people.

[14] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

[15] See, for example, FIDH, 'Briefing Paper on Business and Human Rights: Enhancing Standards and Ensuring Redress' (March 2014).

[16] For an analysis, see Surya Deva, 'Multinationals, Human Rights and International Law: Time to Move beyond the 'State-Centric' Conception?' Jernej Letnar Černič and Tara Van Ho (eds.), *Direct Human Rights Obligations of Corporations* (The Hague: Wolf Legal Publishers, 2015) 27, 31-36.

and does not apply to local businesses registered in terms of relevant domestic law.'[17] Irrespective of the merit of this footnote analysed below, it should be noted that the footnote language is conceptually ambiguous. For example, if 'other business enterprises' include entities with a 'transnational character', should they be not already covered within the definition of TNCs? Moreover, all companies – even TNCs – are registered under domestic law of some country. One should keep in mind that any attempt to define TNCs is likely to prove very difficult, because an entity could be considered 'transnational' in view of multiple alternative variables (e.g., shareholding, operations, business relations, location of offices, nationality of shareholders and directors).

The proposal for the treaty not applying to domestic businesses is rooted in the belief – held by many states in the Global South as well as by the states supporting the resolution – that a legally binding international instrument is required only to deal with business enterprises which operate at a transnational level. Developing countries may also be apprehensive that if the treaty applied to all types of business enterprises, their local/small scale companies might be subjected to heavy burden flowing from international human rights norms. On the other hand, many other states (mostly developed countries from the Global North) oppose the idea of any future treaty being limited to transnational corporations (TNCs): they think that doing so will not only put their TNCs at an economic disadvantage but will also be infeasible in terms of practical implementation.

The breadth question is reflective of the debate about whether the treaty should be limited to 'gross' human rights violation or not. The debate here is underpinned by an *aspirational* desire to put in place a treaty which covers all civil, political, social, economic and cultural human rights and the *political feasibility* of negotiating a narrower set of treaty on which it might be easier to build consensus. The debate is also reflective of the historical divide between civil and political rights on the one hand (which have traditionally been given priority by the Global North) and the social, economic and cultural rights on the other (which have been accorded more importance by the Global South).

Potential options related to the treaty's depth

There are three broad options on how to deal with the depth issue concerning the proposed treaty:

A. Strictly follow the HRC resolution's footnote focus and merely focus on the activities of TNC and other business enterprises with operations of a transnational character.

This option, which will exclude domestic business enterprises from the purview of the treaty, may sound tempting for developing countries in that it would give them leverage against powerful TNCs, while at the same time not subject their small-scale local companies to legally binding international human rights norms. However, this option will be a non-starter from the perspective of developed countries.

From the perspective of those whose human rights are impacted by corporations it will be ideal that the treaty applies to all types of companies. It is a myth to believe that all states could regulate effectively the activities of their domestic companies, or that no human rights standards are required to guide the behaviour of local business enterprises. The fire that killed 72 workers in a Kentex manufacturing factory in the Philippines exposes these myths.[18] It should also be kept in mind that whatever definition of 'TNCs' is agreed upon, lawyers should be able to advise companies on restructuring their business in such a way that their operations are not captured by the treaty.

During the Skype consultation with selected CSOs, a reference was made to the Unity Statement and the need for a treaty to apply to TNCs or the overseas parent companies of local companies, as national laws already exist to regulate domestic companies.[19] However, after some discussion, there was a broad consensus to go for Option B or C, outlined below.

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[17] Note 1, footnote 1.

[18] Irene Pietropaoli, 'Philippines Factory Fire: 72 Workers Need not have Died', *The Guardian*, 8 June 2015, http://www.theguardian.com/global-development-professionals-network/2015/jun/08/philippines-factory-fire-72-workers-unions-human-rights.

[19] 'Notes from Civil Society Consultation with Surya Deva (ELG Member) on the Potential Scope of the Treaty, 8 June 2015', on file with the author.

B. Try to negotiate a treaty which applies to all types of companies. This option could be achieved by contending that the 'scope' of the treaty under the HRC resolution remains an open question,[20] especially because the footnote rider does not appear in the main text of the resolution.
This option may help in bringing developed countries to the treaty negotiation table and in turn build a consensus for the treaty. As noted above, this option should be beneficial for affected people as well. The sentiments expressed in Chiang Mai Unity Statement – i.e., the demand for adopting 'an expansive definition of transnational corporations which encompasses parent companies, subsidiaries and contractors and ensures comprehensive supply chain accountability'[21] – will be closer to this option than Option A.

C. A hybrid option which may bridge the divide between two camps may be to draft a treaty that applies to all companies, but have certain special provisions to deal with TNCs as more difficult regulatory targets.[22] Such special provisions may, for example, relate to stipulating provisions about mutual assistance in investigating violations and in enforcing judgments; explicitly obligating states to regulate corporate conduct extraterritorially; providing rules to govern the liability of parent companies for human rights abuses committed by subsidiaries; providing for rules to limit the corporate misuse of the doctrine of *forum non conveniens*.

Under international law, all of the above options are feasible. It appears, however, that the increasing trend in the 21st century is more towards adopting an instrument which applies to all types of companies, rather than merely TNCs. For example, the 1976 OECD Guidelines for Multinational Enterprises applied to 'multinational enterprises' operating in the territories of OECD countries.[23] The 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises was similarly limited to 'multinational enterprises' *operating in* the territories of OECD countries.[24] However, after the revision of both these instruments in 2000, their scope was extended to other enterprise too.[25] For instance, the 2000 version of the OECD Guidelines applied to multinational enterprises "*operating* in or *from*" the territories of OECD countries.[26] The UN Guiding Principles on Business and Human Rights in 2011 took the final step forward by abolishing the distinction between TNCs and other business enterprises and posited that all companies have a responsibility to respect human rights.

Potential options related to the treaty's breadth

In relation to the breadth of the proposed treaty, there may be at least three options:

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[20] The resolution reads that "first two sessions of the open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises shall be dedicated to *conducting constructive deliberations on* the content, *scope*, nature and form *of the future international instrument*, in this regard". Note 1, para. 2 (emphasis added).

[21] APWLD, 'Unity Statement', note 11. This is confirmed further by the statement demanding 'accountability for the direct, indirect, short-term and long-term impacts of corporate activity, including remote, "down-stream", or cumulative negative impacts'. Ibid.

[22] Beth Stephens, 'Corporate Liability: Enforcing Human Rights Through Domestic Litigation' (2001) 24 *Hastings International & Comparative Law Review* 401.

[23] OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, *ILM*, vol. 15, 967 at 968. Para 8 of the Guidelines provided a definition of 'multinational enterprises'. Ibid at 971.

[24] ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 16 November 1977, reprinted in 1978, *ILM*, vol. 17, 422 at 423.

[25] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012), 80, 90.

[26] OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, DAFE/IME(2000)20, 8 November 2000, p. 5 (para I). In the same vein, the 2000 version of the ILO Declaration provided that the 'principles laid down in the Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, November 2000, para. 11.

A. In the first instance, limit the scope of the treaty to gross human rights abuses. Ruggie, for instance, is in favour of binding regulation only to target 'gross violations' with 'precision tools'.[27]

As there is no definite certainty or consensus yet on what the term "gross"' means,[28] there is some leeway to interpret the term in a manner which is broader than, say, the four crimes covered by the ICC Rome Statute[29] or even broader than the territory occupied by international corporate crimes.[30] It is arguable that a number of factors – such as the character of the right, the magnitude of the violation, the type of person affected (vulnerability), and the impact of the violation – may determine what violations are regarded 'serious' under international human rights law.[31] Bassiouni noted that 'the term "gross violations of human rights" has been employed in the United Nations context not to denote a particular category of human rights violations per se, but rather to describe situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity'.[32]

It is also worth noting that the 1993 Vienna World Conference on Human Rights Declaration stated that gross and systematic violations include 'torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.' [33]

Although the term 'gross' is susceptible to a broad interpretation, it is really doubtful whether proponents of this option have such a wide interpretation in mind, because it would be easier to build consensus only if gross human rights violations are defined narrowly. However, from the perspective of those whose human rights are impacted by corporations the option of such a narrow treaty will not be very helpful, unless states agree to negotiate additional instruments in specific areas on a continuous basis.

B. Extend the scope of the proposed treaty to all 'core' international human rights conventions/instruments.[34] This list would be wider than the 'core' list of internationally recognised human rights that the UN Guiding Principles on Business and Human Rights recommend companies to follow 'at a minimum'.[35]

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27 John Ruggie, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights' (January 23, 2015), p. 5, http://ssrn.com/abstract=2554726.

28 See Jenifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies', A report prepared for the Office of the UN High Commissioner for Human Rights, 25-28 (2014), http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf. Although Ruggie moots the idea of a carefully crafted legal instrument that deals with 'worst' human rights abuses, he does not elaborate clearly what these rights are. John Ruggie, *Just Business* (New York: Norton, 2013), 200. On another occasion, he mentioned that international crimes such as 'genocide, extrajudicial killings, and slavery or slavery-like practices' are obvious candidates for such a category. John Ruggie, 'A UN Business and Human Rights Treaty? An Issue Brief' (28 January 2014), p. 5, http://business-humanrights.org/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf.

29 The ICC Rome Statute covers four international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.

30 See Anita Ramasastry and Robert C Thompson, *Commerce, Crime, and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries* (FAFO, 2006); James Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statue' (2014) 47 *New York University Journal of International Law and Politics* 1.

31 Geneva Academy, 'What amounts to "a serious violation of international human rights law"?' (September 2014), p. 5, http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20breifs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf.

32 'Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights Resolution 1998/43', para. 85.

33 Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993, para. 30.

34 OHCHR, 'The Core International Human Rights Instruments and their Monitoring Bodies', http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

35 Commentary to Principle 12 reads: 'An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the

In terms of filling in governance gaps and strengthening corporate accountability, this option will superior to Option A. Nevertheless, even this option may not fully satisfy the needs of CSOs or affected people, because the 'core' international human rights instruments will not include labour rights, environmental rights or the rights of indigenous people for that matter.[36] In fact, CSOs in the Chiang Mai Unity Statement stressed that there should be 'no regression from existing international human rights standards, including core ILO Conventions' and that 'provisions recognizing the right of indigenous peoples to free, prior, and informed consent' should be included.[37] Having said this, it should be acknowledged that accomplishing Option B will be quite difficult given the divisions and differences of opinion amongst states. Some may also contend that labour rights should continue to be dealt with by the ILO framework or that certain rights which have not yet been recognised in legally binding international conventions should not be included in the proposed treaty.

C. Have an open-ended organic scope encompassing 'all' international human rights conventions/instruments, not merely the *existing* ones but also those that might evolve in *future*. This slightly unconventional option may be operationalised by stipulating in an Annexure to the treaty all the human rights instruments applicable to companies.

This option may be justified normatively: we do not need to renegotiate afresh human 'rights' for the non-state actors; rather what we need to agree upon is 'obligations' with references to whatever rights are recognised in relation to states. This option will also be consistent with the practical reality in which companies could (and do) violate almost all human rights, directly or indirectly. During the Skype consultation, some CSOs supported this option over Option B, as the latter option may not be able to capture all the interests of people affected by corporate activities.[38]

Whichever of the above option is selected, the OPIWG would have to make another drafting choice. The treaty may follow the 'reference model' and prescribe the human rights obligations of companies with reference to state-focal international human rights instrument (e.g., by listing them in an Annexure to the treaty). Alternatively, the proposed treaty may adopt the 'enumeration model' and outline the precise human rights obligations of companies after suitable modifications if any.[39] While the reference model is definitely easier, it might not provide companies enough guidance, as it is difficult to transplant the state-centric text of certain human rights provisions to the private actors. The enumeration model is likely to prove very contentious in negotiating the exact obligations of companies. A solution may, therefore, lie in laying down some general principles with reference to which companies could deduce their human rights obligations in relation to state-centric international instruments.

Recommendations for the OEIWG

Considering the initial consultation with CSOs and views of other members of the ESCR-Net/FIDH's Expert Legal Group, I propose that from the perspective of affected people the treaty should apply to all types of companies and cover the full range of interrelated, interdependent and indivisible human rights (i.e., civil, political, social, economic, and cultural).

If it is irrelevant whether the violator of a human right is a state agency or a non-state actor, why should the distinction based on the territorial operations of a company matter? The proposed international instrument should, therefore, apply to all types of business enterprises.[40] Making a distinction between TNCs and other business enterprises with domestic

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main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.' Guiding Principles, note 14.

[36] During the Skype consultation, it was reiterated that the core ILO Conventions as well as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) should be included in the scope of the proposed treaty. 'Notes from Civil Society Consultation with Surya Deva (ELG Member)', on file with the author.

[37] APWLD, 'Unity Statement', note 11.

[38] Ibid.

[39] A combination of these models may also be adopted, e.g., the 2003 UN Norms.

[40] Ruggie rightly notes that 'the corporate form of the abuser is irrelevant' for those impacted by corporate activities. John Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors',

operations will, in fact, offend the principle of non-discrimination. Moreover, any attempt to limit its scope by providing a definition of targeted corporations will inevitably result in lawyers advising enterprises how to bypass the given definitional contours.[41] Having said this, even if the treaty applies to all companies, it may include special provisions, as outlined above, to deal with TNCs as more difficult regulatory targets.

If the treaty is applicable only to 'gross' human rights violations – even if the term is defined somewhat broadly – it might not cover a great majority of human rights abuses committed by companies all over the world. Why should the proposed international treaty exclude access to remedies for those affected by the Rana Plaza building collapse or the Bhopal gas disaster for that matter? In fact, it is arguable that calls for negotiating a narrow treaty that deals only with gross/egregious abuses is reflective, among others, of the Global North's prioritisation of civil and political rights over social, economic and cultural rights.[42] For people living in the Global South – who suffer disproportionately due to corporate-related human rights abuses – the latter set of rights are equally, if not more, important. Why should the displacement of indigenous people for mining, emission of (and/or exposure to) hazardous chemicals, compulsory pre-employment pregnancy testing of women and illegitimate land grabs by companies be taken less seriously than slavery or genocide?

In short, the treaty should ideally be *deep* and *wide* rather than 'shallow and narrow'. Most of the legal, political or practical problems that scholars[43] and states have flagged in negotiating a legally dinging treaty could be overcome.[44] Kyriakakis aptly sums it: 'If complexity, farsightedness, and tackling politically difficult subjects were reasons not to try, then, for all their flaws, we would have no international criminal justice or international human rights system at all.'[45]

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http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html. Darcy also argues that a focus on TNCs might be too narrow. Shane Darcy, 'A new business and human rights instrument?', p. 6, https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/.

[41] Surya Deva, 'Corporate Human Rights Abuses and International Law: Brief Comments', (28 January 2015), http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/.

[42] Ibid.

[43] Ruggie, 'An Issue Brief'; John Ruggie, 'Quo Vadis?', note 40.

[44] See David Bilchitz, 'The Necessity for a Business and Human Rights Treaty', 30 November 2014, http://ssrn.com/abstract=2562760; Surya Deva, 'The Human Rights Obligations of Business: Reimagining the Treaty Business', 12 March 2014, http://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf.

[45] Joanna Kyriakakis, 'The Debate about having a debate about a business and human rights treaty', 17 February 2015, http://castancentre.com/2015/02/17/debateaboutbusinessandhumanrights/.

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[24 June 2015]

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Business and Human Rights: Time for Genuine Progress

FIDH (the International Federation for Human Rights) appreciates the opportunity to make this first submission to the open-ended intergovernmental working group on transnational corporations and other business enterprises (IGWG) tasked with the elaboration of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[1]

FIDH has continuously advocated for further clarification and codification of existing obligations to ensure effective protection and redress for those negatively affected by the activities of businesses[2]. As a member of the Treaty Alliance[3], FIDH and over 600 civil society organizations and social movements are calling on the UN to elaborate an instrument that will respond to the needs and priorities of those affected[4].

FIDH and its member organizations document cases of corporate-related human rights abuses on all continents. Ranging from operations in conflict situations to supply chain issues, violations include extra-judicial killings, detentions, criminalization of human rights defenders and repression of social protests, deprivation of means of subsistence, child labor and environmental pollution[5]. Human rights defenders denouncing corporate abuses are under increasing pressure and victims of harassment and assassinations are rising[6]. Rights-holders continue to suffer an array of human rights violations, with the situation worsening in some cases, despite increased attention on these issues at the international level over the last decade. Access to justice remains virtually nonexistent for the majority of victims.

FIDH calls on States to build on existing international instruments and initiatives, including the UN Guiding Principles on Business and Human Rights. States should ensure that the treaty process be guided by the principles of participation, transparency and legitimacy. Discussions must address the full range of governance gaps noted by former UN Special Representative on Business and Human Rights, including by reaffirming the primacy of human rights over trade and investment agreements and by addressing the cross-border nature of corporate-related human rights abuses[7]. The treaty, and the process itself, must contribute to strengthening national and regional frameworks and ensure robust and effective enforcement mechanisms.

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[1]Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RSE/26/9 (26 June 2014).

[2]See e.g., FIDH, "Business and Human Rights: Enhancing Standards and Ensuring Redress", Briefing Paper, March 2015, https://www.fidh.org/International-Federation-for-Human-Rights/united-nations/human-rights-council/un-human-rights-council-25th-regular-session/14899-business-and-human-rights-fidh-calls-on-the-international-community-to

[3] The Treaty Alliance is an alliance of committed networks and campaign groups around the world are joining to collectively help organize advocacy activities in support of developing a binding international instrument to address corporate human rights abuses. For more information see: http://www.treatymovement.com

[4]Treaty Alliance Statement, Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse, 2015; and Treaty Alliance, 2013 Joint Bangkok Statement, available at: http://www.treatymovement.com

[5]See for example: "Large-scale mining in Ecuador and human rights abuses: the case of Corriente Resources Inc.", FIDH, CEDHU, Rights and Democracy, December 2010, available at: https://www.fidh.org/IMG/pdf/Exec Summary Large-scale_Mining_Human_Righs_Ecuador-LD.pdf; Cambodia: Land Cleared for Rubber, Rights Bulldozed: The impact of rubber plantations by Socfin-KCD on indigenous communities in Busra, Mondulkiri. FIDH, October 2011, available at: https://www.fidh.org/IMG/pdf/report_cambodia_socfin-kcd_low_def.pdf ; How much are human rights worth in the Brazilian mining and steel industry? The human rights impact of the steel and mining industry in Açalândia. FIDH, Justiça Global, Justiça Nos Trilhos, May 2012, available at https://www.fidh.org/IMG/pdf/report_brazil_2012_english.pdf ; Orange's dangerous liaisons in the Occupied Palestinian Territory, FIDH, CCFD-Terre Solidaire, Al Haq, AFPS, LDH, CGT, SUD, May 2015, available at https://www.fidh.org/IMG/pdf/rapport_orange-eng.pdf

[6]See for example "We are not afraid" Land rights defenders: attacked for confronting unbridled development", FIDH, December 2014, available at: https://wearenotafraid.org/en/

[7]See "Business and Human Rights: Enhancing Standards and Ensuring Redress", FIDH, March 2014.

PROCESS

Ensuring rights-holders participation and a gender-sensitive approach

Transparency and rights-holders' participation must be foundational to this process. Rules guiding the process must encompass the needs and realities of people and communities whose human rights have been infringed, or are being threatened, by corporate conduct. Rights-holders consist of individuals, groups or peoples who are at risk of human rights abuses to their lives, communities, land or environment by corporate activities. They include but are not limited to vulnerable and marginalized groups such as indigenous communities and human rights defenders. A gender-sensitive approach must be followed throughout the entire process.

The IGWG must actively facilitate the participation of rights-holders and civil society organizations working with them. Following the example led by the NGO Coalition for the International Criminal Court during the drafting of the Rome Statute, civil society groups with the objective of promoting and protecting human rights should be given primacy during the negotiation process. The participation, experiences, and needs of directly affected rights-holders must inform and guide the drafting process.[8]

A transparent and good-faith process

FIDH calls on all States to actively engage in good faith in the IGWG. All stakeholders should officially be consulted and invited to share their perspectives through an inclusive and constructive dialogue.

Participating officials must act in a manner that is fully consistent with their human rights obligations and ensures their compliance with and fulfillment of such obligations. States must preserve their integrity from undue influence by private actors whose primary objective falls outside the promotion of human rights.[9] The procedures must safeguard the IGWG from corporate capture, whereby corporate interests are prioritized over peoples' interests in processes and institutions.[10] All parties involved in the negotiations should publicly disclose their proposals and positions. All experts assisting delegations must disclose any circumstances that may present a conflict of interest.

SUBSTANCE

Scope of the instrument

The treaty must address challenges currently faced by those affected by corporate harm when seeking prevention, accountability and remediation. FIDH urges for the elaboration of a treaty that encompasses all existing human rights obligations arising from international and regional treaties, statutes and agreements, as well as any other relevant instruments, including the UN Declaration on the Rights of Indigenous Peoples. This is consistent with the principles of indivisibility, universality and interdependence of all human rights. The treaty must thereby ensure that it can address the array of violations victims currently face.

In 2015, ESCR-Net & FIDH launched the Treaty Initiative project[11], a project bringing together legal experts from all regions to form an Expert Legal Group (ELG) to work with civil society in all global south regions to develop legal proposals to feed the IGWG's discussions, including with regard to the treaty's breadth[12].

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[8]See Unity Statement produced by the participants in the Asia Pacific Regional Conference, Asia Pacific Civil Society's demands for the Legally Binding Treaty on Business and Human Rights, drafted during ESCR-Net, FIDH and APWLD Asia Pacific Regional Consultation, **held in Chiang Mai in May 2015,** https://www.escr-net.org/node/366236

[9]See Treaty Alliance Statement, Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse, 2015, available at: http://www.treatymovement.com/statement

[10] Ibid.

[11]ESCR-Net & FIDH Treaty Initiative Project, https://www.escr-net.org/cawg/treatyinitiative

[12]See Working Paper of the ESCR-Net & FIDH Treaty Initiative
, Surya Deva (Lead author for the Expert Legal Group)

Inclusion of all business enterprises

FIDH firmly believes that a legally binding instrument must address the human rights violations arising from the activities of all business enterprises. It is critical that the treaty addresses the cross-border nature of corporate-related activities and abuses. The treaty must address ways to ensure accountability for parent companies, subsidiaries, contractors (whether corporate or government contractors) and entities in the supply chain.

All businesses, including State-owned enterprises and local businesses, are susceptible of having a negatively impacting on human rights in impunity,, and as a result of governance gaps, deficiencies, inadequate enforcement of national laws and impunity can prevail. From a victim's perspective, the formal character of a business is irrelevant; rather victims focus on the need to access to effective remedy and reparation for the harms they have suffered. Since the treaty will centralize the needs of persons and communities adversely affected by business activity, it should t address all business enterprises that can potentially cause or contribute to human rights abuses.

Prevention

Under international law, States have a duty to protect human rights by regulating the behavior of non-state actors, including private actors.[13] States are expected to take all reasonable measures in order to prevent private actors from adopting conduct that may lead to human rights violations. FIDH strongly believes the treaty must oblige States to adopt regulatory measures to prevent corporate abuses to human rights. This includes requiring business enterprises to adopt policies and procedures that seek to prevent, stop and redress negative human rights impacts wherever they operate or cooperate, and to establish enforcement mechanisms, to the extent either does not currently exist or is insufficient. States' duty to protect must – at a minimum- be interpreted as applying to both home and host States.

The treaty should clarify the nature or scope of conduct by a business entity that will give rise to legal liability, including criminal liability, such as aiding and abetting and other forms of complicity. Companies should be subjected to appropriate sanctions for failing to respect human rights, including for failure to adopt or comply with internal policies and procedures. Through this international instrument, the obligation on States to translate these standards into national legislation shall be explicitly set forth.

Remediation

Finally, States must be required to put in place effective monitoring, enforcement and remedy mechanisms. Under international law, States have a duty to provide access to adequate, effective and prompt remedies. The IGWG must prioritize access to justice and reparation for victims. National jurisdictions are largely failing to meet this obligation, as recently highlighted by the Kiobel decision in the United States[14] and legal aid reform in the UK. Provisions must be included to ensure affected people can – at a minimum – access effective remedies in their own States as well as in the home State of the business enterprise concerned. Provisions should also allow for all other States that may have jurisdiction over the concerned enterprise to ensure access to remedy, such as "where the corporation, or its parent or controlling company, has its centre of activity [...] or has its main place of business or substantial business activities [...][15]". Provisions should address States' obligation to cooperate in preventing, punishing and ensuring enforcement, including for instance through mutual and legal assistance. Strengthening the international normative framework will

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See Working Paper on the 'Scope' of the Business and Human Rights Treaty, Surya Deva, ESCR-Net & FIDH Joint Treaty Initiative, 22 June 2015Legal Group (ELG) to work on concrete propositions towards a binding treaty on business and human rights.

[13]See e.g. authoritative guidance of UN treaty bodies. CERD, "Concluding Observation of CERD: Canada", CERD/C/CAN/CO/18, 25 May 2007; Committee on the rights of the child,General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013. See also Concluding observations of the Committee on Economic, Social and Cultural Rights in 2013 for Austria (E/C.12/AUT/CO/4), Norway (E/C.12/NOR/CO/5) and Belgium (E/C.12/BEL/CO/4).

[14]See Kiobel v. Royal Dutch Petroleum, Co.133 S.Ct. 1659 (2013).

[15]See e.g. the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", September 2011Article 25 (c): Bases for protection States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means... as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.

reinforce national and regional frameworks. In line with the principle of complementarity, the treaty should support the establishment of supra-national remedial mechanisms.

Any international instrument resulting from this process should contribute to further clarify and codify existing obligations and ensure redress for corporate-related abuses. Building upon hard and soft law standards set thus far, it should under no circumstances represent a regression or dilution of existing human rights standards.

United Nations A/HRC/WG.16/1/NGO/9

General Assembly

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Human Rights Council
Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
First session
Geneva, 6–10 July 2015

Joint written statement* submitted by Social Service Agency, Global Policy Forum, Geneva Infant Feeding Association, CIDSE, non-governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Please recycle

Contributions to the legal building blocks of the Treaty regarding the scope, the state duty to protect and direct obligations for corporations

I. Introduction

The open-ended intergovernmental working group (IGWG), established under the Human Rights Council (HRC) Resolution 26/9, is mandated "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[1] The first two sessions of the IGWG "shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument".[2] The IGWG will have its first session during 6-10 July 2015 in Geneva.[3]

In order to inform the IGWG's work, the undersigned civil society organisations (CSOs), members of the Treaty Alliance, commissioned legal research to legal advisory bureau Global Rights Compliance, Dr Surya Deva and Professor Olivier de Schutter. These are all legal experts who have been engaged in the international debate on business and human rights.

Building on the papers of these legal experts,[4] we have developed a submission with regard to the following elements of the Treaty Proposal:

1. Scope of the treaty
   A. What rights should be covered by the treaty?
   B. To which companies should it apply?
2. State duty to protect
   A. Human Right Due Diligence
   B. Access to Justice
3. Direct obligations for corporations

II. Scope of the Treaty

1. What rights should be covered by the Treaty?

One of the most prominent discussions, both in academic and political circles, is what rights should be covered by the Treaty,[5] with options ranging from focusing on gross human rights to a more inclusive approach. The position of the undersigned organisations is that the Treaty should be inclusive of all human
rights for it to be of any value for victims of business related human rights abuse, which will be argued and substantiated below.
Focus on gross human rights violations too narrow

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1 Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (24 June 2014), para. 1, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

2 Ibid, para. 2.

3 Human Rights Council, 'First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx.

4 Global Rights Compliance. Proposals for a Treaty on Business and Human rights: Part I: Definition of standards Part II: Access to Justice.11 June 2015; S. Deva. Business and Human Rights Treaty: Objects of Regulation/Scope. June 2015; O. de Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 10 June 2015.

5 For instance, see: D. Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (November 30, 2014), http://ssrn.com/abstract=2562760; S Dhanarajan & CM O'Brien, Human Rights and Businesses; 14th Informal ASEM Seminar on Human Rights, ASEM-Hanoi (2014) Available at:
http://www.asef.org/images/docs/Background Paper.pdf (Accessed 21 May 2015).

We are concerned that if the Treaty focuses only on violation of gross human rights[6], this will not be helpful from a victims' point of view, because it will not cover a great majority of human rights abuses committed by companies all over the world. Why should the proposed international Treaty exclude access to remedies for victims of the Rana Plaza building collapse or the Bhopal gas disaster? If the scope of the proposed international instrument is confined to gross human rights violations, it will mostly serve a symbolic purpose
for its ambit will exclude most of the human rights abuses committed by companies in practice.[7]
It is also arguable that calls for negotiating a narrow Treaty that deals only with gross/egregious abuses is reflective, among others, of the Global North's prioritisation of civil and political rights over social, economic and cultural rights.[8] For people living in the Global South – who suffer disproportionately due to corporate- related human rights abuses – the latter set of rights are equally, if not more, important. The displacement of
indigenous people for mining, emission of (and/or exposure to) hazardous chemicals, compulsory pre- employment pregnancy testing of women and illegitimate land grabs by companies concerns fundamental and serious abuses.[9]
We therefore propose that all human rights should be incorporated into a binding Treaty. This should include the rights contained in the core human rights instruments[10] as well as the core ILO conventions related to labour rights and the rights of indigenous people.
The undersigned organisations propose that it should be made clear from the start that when the Treaty refers to human rights, this includes the negative impacts of environmental damages on people. Environmental damage affects rights such as the right to health, the right to life, the right to food, the right to
water, the right to housing (where displacement results from environmental damage, in the form of severe pollution or other disasters), and other human rights including the right to self-determination.[11] A significant proportion of human rights violations alleged to be caused by the activities of transnational corporations have their source in the environmental damage caused by such activities: nearly one third of the 320 cases of alleged corporate-related human rights abuses reviewed by the Special Representative of the UN Secretary-
General on the issues of human rights and transnational corporations and other business enterprises alleged environmental harm to the communities affected.[12]

2. To which companies should it apply?

The issue of regulatory targets revolves around the "footnote" in the HRC resolution, which reads: '"Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.:[13] This footnote is problematic for several reasons. First of all, it lacks conceptual clarity, for all companies –

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[6] There is no definition or consensus yet on what the term "gross"' means. While the term can be interpreted in a broader way by referring to the manner in which the violations may have been committed or to their severity, a narrow understanding limitinggross Human Rights violations to crimes such as torture, slavery, genocide or extra-judicial killings is much more widespread.

[7] Surya Deva, 'The Human Rights Obligations of Business: Reimagining the Treaty Business', page 7, http://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf.-5

[8] Surya Deva, 'Corporate Human Rights Abuses and International Law: Brief Comments', (28 January 2015), http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/

[9] Ibid.

[10] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

[11] See in particular Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, UN doc. A/HRC/10/61 (15 January 2009); Analytical study on the relationship between human rights and the environment. Report of the United Nations High Commissioner for Human Rights, UN doc. A/HRC/19/34 (19 Dec. 2011); and Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report, UN doc. A/HRC/25/53 (30 Dec. 2013). , The impacts for some peoples could be such that their right to self-determination could be affected, including their right not to be deprived of their own means of subsistence (International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966)). As noted in the report by the High Commissioner for Human Rights cited above : "Sea-level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States. Equally, changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination" (A/HRC/10/61, para. 40).

[12] A/HRC/8/5/Add.2, para. 67.

[13] Footnote 1 of the Human Rights Council Resolution 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (24 June 2014), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

even TNCs – are registered under domestic law of some country. Moreover, if "other business enterprises" include entities with a "transnational character", should they be not already covered within the definition of TNCs? A second and more problematic aspect is that any attempt to define TNCs is likely to prove futile, because an entity could be considered "transnational" in view of multiple alternative variables (e.g., shareholding, operations, business relations, location of offices, nationality of shareholders and directors). The undersigned organisations therefore fear that any attempt to limit its scope by providing a definition of targeted corporations will inevitably result in lawyers advising enterprises how to bypass the given definitional contours.[14]

Since "the corporate form of the abuser is irrelevant" for victims,[15] the proposed international instrument should apply to all types of business enterprises.[16] This approach is consistent with the trend in international law towards adopting instruments which apply to all types of companies, rather than merely TNCs. For example, although the 1976 OECD Guidelines for Multinational Enterprises[17] and the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises [18] were limited to TNCs, the revision of both instruments in 2000 extended their scope to other enterprise too.[19] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises[20] and the 2011 Guiding Principles on Business and Human Rights followed this trend.[21]

In order to bridge the divide in the debate of those supporting the footnote and those opposed to it, a hybrid option may be considered. Under this option, while the proposed Treaty would not exclude any business category, its main objective and focus would be on provisions for transnational operations of business (e.g. an obligation on states to regulate the extraterritorial activities of business and to provide mutual assistance between states in investigating violations and in enforcing judgements).

III. State Duty to Protect

A new instrument on business and human rights should define in greater detail the content of the States' duty to protect human rights by regulating transnational corporations and ensuring access to justice for affected people. The duty of the State to protect human rights from being violated by private entities and ensure remedies is well established under international human rights law. Building on the pronunciations of the UN Treaty bodies and special rapporteurs as well as the UN Guiding Principles on Business and Human Rights a new legally binding instrument should clarify that such a duty:

- Includes a duty to impose a due diligence obligation on companies to identify, prevent and mitigate human rights impacts it causes, contributes to or is directly linked to through operations at home or abroad.
- Requires states to provide access to justice to victims and to cooperate with other countries to facilitate the investigation, trial and execution of cases of transnational nature.

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14 Deva, 'Brief Comments', footnote http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/.

15 J. Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors', http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

16 Darcy argues that a focus on TNCs might be too narrow. Shane Darcy, 'A new business and human rights instrument?', p. 6, https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/. Bilchitz, however, argues that it is defensible to apply the treaty only to TNCs. David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (November 30, 2014), http://ssrn.com/abstract=2562760.

17 OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, ILM, vol. 15, 967.

18 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 16 November 1977, reprinted in 1978, ILM, vol. 17, 422.

19 S. Deva, Regulating Corporate Human Rights Violations: Humanizing Business (London: Routledge, 2012), 80, 90.

20 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), paras. 20-21.

21 'These Guiding Principles apply to all … business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), General Principles. See also Principle 11 and the Commentary.

1. Human Rights Due Diligence

A new binding instrument should clarify the duty of States to effectively ensure that business complies with the due diligence requirements described in the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises. Under the UNGPs, the process of human rights due diligence (HRDD) entails assessing the actual and potential human rights impacts from its operations; integrating and acting upon the findings made; tracking responses; and communicating how the negative impacts have been addressed. Of particular relevance is the obligation for business enterprises to consult with potentially affected groups and other relevant stakeholders when a potentially adverse human rights risk is identified. This is crucial in order to effectively and satisfyingly address negative impacts on citizens and the environment.

The UNGPs state very clearly that companies can impact all human rights, and in a number of ways: not only by causing the violations, but also by contributing to it, or by being directly linked to the violations through its activities and business relationship.[22] This understanding of due diligence has proven to be extremely valuable in advancing the discussion on the corporate responsibility to respect human rights; from a restrictive discussion focused on sphere of influence to a more encompassing discussion where the focus is on human rights impacts and addressing those. The Treaty should build on this major achievement

However the UNGPs fall short of specifying the concrete steps that States should take to ensure that business enterprises comply with this HRDD obligation.[23] A binding Treaty should clarify the State duty to ensure appropriate, coherent and consistent corporate due diligence. It should include provisions on the extraterritorial scope of due diligence regulation as well as liability for due diligence breaches, as further developed below.

Extraterritorial scope

The State duty to regulate corporate activities is an area where the UNGPs fall behind the current state of international law.[24] Although the Guiding Principles provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" the UNGPs recognize only strong policy reasons but no legal obligation to regulate the extraterritorial activities of business.[25] These formulations have now clearly been overtaken by the evolving nature of international human rights law. The obligation of a State to control the conduct of non-State actors where such conduct might lead to human rights violations outside its territory has been explicitly affirmed by various United Nations human rights Treaty bodies, such as the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination.[26]

The Maastricht Principles on the extraterritorial obligations of States in the area of economic, social and

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22 Guiding Principle 17

23 Global Rights Compliance,Proposals for a Treaty on Business and Human rights: Part I: Definition of standards, p. 2.

24 O. de Schutter: Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p. 6

25 Commentary to Principle 2 of the UN Guiding Principles on business and human rights

26 O. de Schutter: Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.6: "The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should "prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law". Specifically in regard to corporations, the Committee on Economic, Social and Cultural Rights has further stated that "States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant". Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, in 2007, it called upon Canada to "…take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada", recommending in particular that the State party "explore ways to hold transnational corporations registered in Canada accountable"; see also Committee on the Rights of the Child: General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights

cultural rights, which were endorsed by a range of experts and organisations in 2011, clarify the extraterritorial obligations of states on the basis of this developing international understanding. A legally binding instrument should seek inspiration from Principles 24 and 25 of the Maastricht Principles and be explicit about the extraterritorial scope of the state duty to protect.[27]

Liability

The Treaty will not only need to clarify the HRDD obligations throughout the whole range of business relationships, but will also have to include clear provisions of legal liability. The Treaty should elaborate on the modalities in which TNCs and other business enterprises participate in the commission of human rights abuses, including through corporate complicity, responsibility for offences of corporate structures and human rights abuses in supply chains. A Treaty should clarify that by means of HRDD, TNCs and other business enterprises should take all possible efforts and effective measures to prevent negative human rights impacts, and that a breach of HRDD will give rise to legal liability, whether civil, criminal or administrative.

The French Bill on the duty of care in relation to subsidiaries and sub-contractors of French companies is a good example of HRDD regulation. It introduces an obligation for certain business enterprises to adopt a 'due diligence plan' ('plan de vigilance'), which should include reasonable measures to identify and prevent the human rights and environmental risks resulting from their business operations as well as those of their subsidiaries, sub-contractors and suppliers. The company can be held liable on the bases of the Civil Code if it failed to exercise adequate due diligence. In the criminal law context due diligence requirements can be linked to principle liability as well as the legal notion of complicity.

The notion of complicity serves to identify the responsibility of companies where another entity, their business partners (their suppliers or sub-contractors) or the host government, commits human rights abuses, which are considered as criminal offences under either international or internal law. The notion may be examined both in the relationships between the concerned company and its business partners, and in the relationships between that company and the country in which it operates. Where a company is in a joint venture with the host government or with another private actor and has knowledge of, or should have known of, human rights violations committed by that partner in the fulfilment of the agreement, the company should be considered complicit in the violation for not having put an end to the business relationship.[28]

In its 2005 report prepared at the request of the Commission on Human Rights, the Office of the High Commissioner for Human Rights states that: Four situations illustrate where an allegation of complicity might arise against a company. First, when the company actively assists, directly or indirectly, in human rights violations committed by others; second, when the company is in a partnership with a Government and could reasonably foresee, or subsequently obtains knowledge, that the Government is likely to commit abuses in carrying out the agreement [29]; third, when the company benefits from human rights violations even if it does not positively assist or cause them; and fourth, when the company is silent or inactive in the face of violations.[30]

Legal liability provisions will also need to ease the burden of proof. For those affected by corporate injustice, the complex organisational processes within a company and its business relationships are difficult to determine and prove. Therefore state regulation should shift the burden of proof from the claimant to the defendant, for example by enshrining the concept of HRDD as a defence in legal proceedings.[31]

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[27] Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights: http://www.etoconsortium.org/en/library/maastricht-principles/

[28] O. de Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p. 21

[29] Although, in the description of this category of complicity, reference is made only to the business partner of a company which is a government, the same reasoning should hold for the situation where the business partner is a private understanding. This is confirmed by the OHCHR Briefing paper, 'The Global Compact and Human Rights : Understanding Sphere of Influence and Complicity' referred to above, supra n. 43, which describes as 'complicity in case of joint venture' as the situation where 'the company has a common design or purpose with its contractual partner to fulfil the joint venture. It knew or should have known of the abuses committed by the partner'.

[30] Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, 15 February 2005, UN doc. , para. 34 (citing International Council on Human Rights Policy, Beyond Voluntarism: Human rights and the developing international legal obligations of companies, (Geneva, February 2002), pp. 125-136).

[31] GRC. Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 8. "However, it has to be borne in mind that this has to be approached carefully in criminal proceedings that generally, but not always, demand that the burden of proof is placed on the prosecution. Such inversion of the burden of proof may arise in criminal matters but on an extremely limited basis and then only on the balance of probabilities, and not the beyond a reasonable doubt standard."

1. Access to Justice

Despite a State duty to provide access to a judicial remedy being embedded within both international Human Rights Law and the UNGPs, victims continue to face barriers that obstruct their access to justice.[32] The urgent need to provide enhanced access to justice requires rigorous investigation of options,
at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities.[33] Domestic remedies may lack reach and enforcement power. The Treaty should create and support a mutually reinforcing remedy regime that
provides for a vibrant relationship between different adjudicative mechanisms at both the domestic and international level.[34]

In addition to creating a strong monitoring mechanism at the international level the Treaty should specify the state duty to provide access to remedies by including provisions on extraterritorial jurisdiction and mutual legal assistance, as further developed below.

Extraterritorial jurisdiction

A majority of violations occur in weak governance zones or conflict-affected areas, where a lack of an independent judiciary or fully functioning courts impedes access to justice for victims. In situations where host states are either unwilling or unable to provide access to justice-related mechanisms for victims of human rights violations by transnational corporations, extraterritorial jurisdiction is of crucial importance. This problem is recognized by the UN guiding principles on business and human rights which state in the commentary that "[l]egal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed" include the situation "[w]here claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim", thus acknowledging the duty of
the State to provide access to remedies in home State courts for human rights violations occurring in a host State, whenever victims cannot have access to effective judicial remedy in that State.[35]

A number of UN Treaty bodies recommendations have stated the state duty to provide redress for violations committed by corporations abroad.[36] The Maastricht principles affirm this duty in Principle 36 indicating that "States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations".[37]

A Treaty should therefore:

> oblige states to take necessary measures to ensure through judicial, administrative, legislative or other appropriate means, that those affected have access to effective judicial remedy:
> when human rights abuses occur within their territory and/or jurisdiction ; and
>
> when human rights abuses occur outside their territory and/or jurisdiction, but the abuses are committed by an entity which (i) is owned (partly or fully) by a corporation which has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned, or (ii) has a business relationship with such a corporation.[38]

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32 G Skinner, R McCorquodale and OD Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (The International Corporate Accountability Roundtable [ICAR], CORE and The European Coalition for Corporate Justice 2013) 66.

33 Human Rights and Transnational Corporations and other Business Enterprises, UNGA Res 17/4 (6 July 2011) UN Doc A/HRC/Res/17/4, para. 6(e).

34 GRC, Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 1.

35 O. De Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p. 11

36 The CRC, for instance, put it clearly in its concluding observations on Turkey, urging the country to "examine and adapt its legislative and administrative framework to ensure legal accountability of business entities domiciled in Turkey and their affiliates operating abroad with regard to violations of human rights, especially child rights, committed in the territory of the State party or overseas, establish monitoring mechanisms, investigate and redress such abuses with a view to improved accountability, transparency and prevention of violations". Under the International Covenant on Civil and Political Rights (CCPR), the Human Rights Committee noted in 2012 in a concluding observation relating to Germany: "The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encourages to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad."

37 Principle 36, Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights: http://www.etoconsortium.org/en/library/maastricht-principles/

To ensure the supremacy of Home States, the Treaty could include a 'consultation clause' providing that a Home State, intending to exercise its extraterritorial jurisdiction, has the obligation to consult the Host State about its intention to initiate proceedings. If the Host State refuses to pursue the case or does not respond, the Home State could proceed.[39] According to Olivier de Schutter such a consultation could be 'a powerful incentive on the Host State to adopt the necessary measures ensuring that the human rights violations be remedied and, if necessary and in compliance with the legal principles of its national legal system, sanctioned.'[40]

Mutual legal assistance

Extraterritorial jurisdiction risks being ineffective if the host State opposes the litigation and decides not to cooperate with such an investigation.[41] And where the host State exercises jurisdiction it is dependent on home State cooperation for the execution.

In international law it is increasingly acknowledged that, in transnational situations, States should cooperate in order to ensure that any victim of human rights violations caused by the activities of non-State actors has access to an effective remedy. Extraterritorial obligations of international cooperation are already contained in several human rights treaties, such as the Convention on the Rights of Persons with Disabilities, the International Convention for the Protection of all Persons from Enforced Disappearance as well as in the first two Optional Protocols to the Convention on the Rights of the Child. The Maastricht Principles reaffirm this State duty in principle 27 stating that States must cooperate to ensure an effective remedy for those affected.[42]

A new instrument should build on this State duty to cooperate This approach would allow the State party to better discharge its duty to protect human rights by regulating transnational corporations, since the State concerned would benefit from the assistance of other States parties implicated in a situation covering different jurisdictions. This would facilitate in particular the collection of evidence, including the hearing of witnesses and access to financial records, the freezing and confiscation of assets; and the enforcement of judgments delivered against the corporations concerned.[43] It would, therefore, be less easy for the transnational corporation to seek refuge behind the multinational dimension of its activity, in order to escape liability for human rights wrongs it may have committed.[44]

In order to clarify what might be included in a new international instrument providing for legal mutual assistance to combat human rights violations by transnational corporations, inspiration may be found in chapter IV of the United Nations Convention against Corruption (UNCAC).[45]

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38 Suggestion by O. de Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 Jue 2015, p. 11

39 GRC, Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 6: See eg. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 25(8), which provides that, where more than one state claims jurisdiction over an alleged offence, "the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution."

40 O De Schutter, Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations, CRIDHO Working Paper 2010/5 (2010).

41 D Bilchitz, 'The Moral and Legal Necessity for a Business and Human Rights Treaty', (2015). Available at: http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf (Accessed 21 May 2015).

42 Principle 27 Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights: http://www.etoconsortium.org/en/library/maastricht-principles/

43 Cooperation between States in holding perpetrators accountable is already taking place when it comes to international crimes. For example, the European Network of contact points for prosecuting international crimes is a network of prosecution authorities, and was established to ensure close cooperation between the national authorities in investigating and prosecuting international crimes by exchanging information on investigation and prosecution, facilitating cooperation and assistance between law enforcement and judicial authorities, exchanging best practices, experiences and methods, and raising awareness. See: http://eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx

44 O. De Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.25

45 GRC, Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 9; O. De Schutter.

I. Direct obligations for corporations

There is much debate on whether and how a new legally binding instrument could directly address corporations. The added value of a new legally binding instrument imposing direct human rights obligations on transnational corporations would depend on whether or not the supervisory and enforcement mechanisms included in such an instrument go beyond the protection already afforded by the human rights Treaty bodies and the Special Procedures of the Human Rights Council.

One form this could take is for the Treaty, open to signature and ratification, to engage States to accept that all transnational corporations under their jurisdiction are subjected to some form of control, more robust than the existing monitoring mechanisms. In other terms, by ratifying this instrument, a State would express its consent to a new monitoring and enforcement mechanism applying directly to the transnational corporations under its jurisdiction: where it is alleged that a human rights violation has been committed by such a corporation, that State would agree that the corporation itself would have to respond to such allegations before an international mechanism, unless the violation has been addressed through legal remedies available within the State concerned.

A Treaty thus conceived could provide a significant incentive for the State to improve the remedies available in the domestic legal order to victims of corporate human rights harms, as well as for the corporations concerned to prevent, and where necessary remedy, any such harm. However, it would be important to avoid a situation in which the possibility to directly hold a corporation accountable under such a mechanism, would allow a State to circumvent its own specific duty to protect human rights by regulating the conduct of corporations under its jurisdiction. Thus, direct obligations for corporations should be seen as

complementary to the suggestions above aiming at strengthening the duty of the State to protect human rights and at clarifying the scope of such a duty.[46]

II. Conclusion

Together with other members of the Treaty Alliance, we underline that "[t]he enhancement of the international human rights system in relation to TNCs and other business enterprises is urgent and needed."[47]

Our organisations work with communities and individuals currently suffering abuses and violations of their human rights as a result of business activity. Concrete action is needed to protect women and men seeking to defend their rights and the environment in the face of harmful corporate practice and to address the denial of access to justice to communities in numerous countries.

During the June 2014 UN Human Rights Council session which saw the adoption of Resolution 26/9, there was general recognition by States of continuing gaps in the UN business & human rights framework, particularly in relation to ensuring access to justice. It is now time to open constructive discussions in the IGWG towards developing an international legally binding instrument that can make an important contribution to effectively stopping the occurrence of human rights abuses by businesses on the ground.

Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.26

[46] O.De Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.18

[47] Second treaty alliance statement: http://www.treatymovement.com/statement

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SOMO- Centre for Research on Multinational Corporations and International Baby Food Action Network (IBFAN), NGOs without consultative status, also share the views expressed in this statement.

United Nations A/HRC/WG.16/1/NGO/10

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First session
Geneva, 6 – 10 July 2015

Written statement* submitted by International Service for Human Rights, a non-governmental organization in consultative status.

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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This document is submitted by the International Service for Human Rights (an NGO in special consultative status with ECOSOC) on behalf of Centro Mexicano de Derecho Ambiental (Mexico), Foundation HELP (Tanzania), ISHR, Plataforma Internacional Contra la Impunidad, Project on Organizing, Development, Education, and Research (PODER - Mexico) and Terra de Direitos (Brazil).

Human rights defenders play a critical role in making visible, preventing, mitigating and ensuring accountability and follow-up for corporate human rights abuses. Despite this, around the world, there are increasing reports of human rights defenders who advocate for corporate accountability — whether in relation to the extractive sector, labour rights, land rights, Indigenous rights or otherwise — being the subject of attacks, threats and harassment, including judicial harassment.

As a newly established process supported by many NGOs, the expectations on the IGWG by civil society and human rights defenders around the world are high. This is even more the case since it is often described as a response to business related human rights violations, and as the long-awaited avenue for putting an end to the widespread impunity for such violations.

This submission is intended to inform the IGWG in its discussion, and assist States, OHCHR and civil society to enhance the working methods over time. It makes recommendations in relation to the process before, during and after the first session of the IGWG from the perspective of human rights defenders, and sets out basic considerations as to the discussions on content and scope of a future treaty foreseen for the first session of the IGWG.

The recommendations can also be seen as indicators or benchmarks, which may serve to measure the success of the IGWG and the positions of States participating or considering to participate in its deliberations.

Process

The following considerations are critical to ensure that the IGWG meets the high expectations placed on it:

1. Adequate space, time and modalities for human rights defenders, civil society and affected communities to participate, so as to allow for their full and effective participation

The resolution establishing the IGWG recognises the important and legitimate role of civil society actors, and requests the IGWG to collect written input from relevant stakeholders. It is therefore critical that human rights defenders are transparently informed about, and effectively consulted on, the program and content of each session of the IGWG, as well as the timeline for negotiations. The experience of the Human Rights Council's institution-building process could be instructive in that regard.

Recommendations in this regard include:

To the chair of the IGWG:

- Ensure civil society input into and timely circulation of the program of work and selection of speakers and experts for each session;
- Consult with all members and observers of the Human Rights Council, without discriminating between State and NGO observers, in line with paragraph 11 of GA Resolution 60/251
- Open space for the participation of both ECOSOC and non-ECOSOC accredited organisations so as to benefit from the expertise and insight of all human rights defenders and civil society organisations wishing to participate, irrespective of their existing consultative relationships with ECOSOC/DPI.
    - Note: This has been the case with many other international standard setting processes, such as the process for drafting the Convention on the Rights of Persons with Disabilities.
    - Although this would also enable the participation of business associations, we believe that this is an effective compromise in order to allow business to transparently voice its views with regard to the IGWG process, and may contribute to levelling the playing field between corporate and NGO voices.

  - Allowing the broadest possible participation will also contribute to increasing the effectiveness and legitimacy of the process;
- Invite the participation of A-Status national human rights institutions (NHRIs) in sessions of the IGWG and informal processes related to it;
- Permit civil society to web-cast the sessions of the IGWG per the standard practice of UN treaty bodies, and explore other opportunities to use technology to enhance access to and participation in the IGWG, including through official webcasting and remote participation per the Human Rights Council's practice.

To all States:

- Hold inclusive national and/or regional level consultations in preparation of each session of the IGWG, so as to inform positions in a transparent manner;
- Actively facilitate participation of civil society, human rights defenders and victims of human rights violations in both national and international level discussion on the IGWG, as well as the sessions themselves;
- Be transparent about national-level consultations with business enterprises or associations, in the event they are conducted separately from those with defenders and affected communities;
- Support the broadest possible participation in the IGWG (see point re non-ECOSOC NGOs above).

2. Put in place specific mechanisms for the protection for human rights defenders and civil society participating in the IGWG processes

Human rights defenders working on issues of corporate accountability are frequently victims of threats, intimidation and attacks as a result of their work, from both State and non-State actors. The United Nations and member States have both a moral and legal obligation to ensure that those who contribute to the work of the IGWG can do so safely, without hindrance or fear, and without negative consequences for themselves or their organisations. This should include, but is not limited to, protection from direct threats against human rights defenders, threats against their organisations, or threats by businesses or governments to suspend other on-going cooperation or dialogues.

Recommendations in this regard include:

To the Chair of the IGWG:

- Ensure the putting in place of a process, on the part of the secretariat and with the explicit support of the Chair, to prevent acts of intimidation or reprisals against individuals participating, or seeking to participate, in IGWG processes;
- Address alleged cases of intimidation or reprisals with the concerned State or non-State actors, including business.

To all States

- Prohibit any intimidation or reprisal against a person or organisation in association with their cooperation with IGWG processes (at all levels), and ensure timely and comprehensive investigation of allegations, as well as effective remedies in that regard.

3. Ensure that the IGWG process is complementary to on-going efforts in the area of business and human rights, including the implementation of the Guiding Principles, and is conducted in a constructive and a 'non-politicised' manner

The Human Rights Council, many civil society organisation and human rights defenders have recognised the need to close regulatory gaps at national and international levels, including by embarking on the IGWG process. At the same time, there are a number of processes undertaken under the auspices of the UN and regional organisations that engage similar stakeholders, with a view to stopping human rights violations related to business operations.

In this context, we recognise that both home- and host-States of businesses have critical, if differentiated, obligations to protect and promote human rights, and protect human rights defenders. Therefore, good faith efforts are needed by all States to ensure the success of the IGWG process, and its ability to enhance protection for rights-holders around the world.

Recommendations in this regard include:

To the chair of the IGWG:

- Consider ways of building consensus on process and substance, and of bridging the political divide on this issue of common concern to all States. This could include the formation of a 'group of friends' of the IGWG;
- Find regular and public ways of ensuring that the views non-participating States are heard.

To all States:

- Participate, in a constructive and substantive manner, in the sessions of the IGWG, while continuing efforts in other forums.

Content & Scope

We recognise that the elaboration of an international instrument will be an iterative and evolving process, and that the first session if the IGWG is intended to be a forum for brainstorming "big picture" questions with regard to scope and content.

In that regard, we suggest that the recommendations guide the discussions over the first session of the IGWG, and that they be duly taken into account in the final outcome document.

Recommendations to all participants are:

1. Victims of human rights violations suffer independently of the legal form, size or country of origin of the business enterprise implicated in the violation. It is therefore imperative for the IGWG to apply the broad reading of OP1 mandating it to "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" without distinction between domestic or transnational companies;
2. All human rights are universal, indivisible, interdependent, and interrelated. The IGWG should therefore substantively consider the impact of business operations on the full range of human rights, while recognising that human rights norms and standards are not static, and may evolve over time;
3. The treaty should be structured so as to provide for and appropriate monitoring and review mechanism, building on the good practice experience of existing treaty bodies, including as regards individual complaints, while innovating with regard to corporate obligations and both State and corporate compliance;
4. Effective access to justice for victims should guide the discussion in the IGWG and the treaty, regardless of the balance struck in relation to the extraterritorial application of human rights obligations;
5. The protection of human rights defenders and the creation of an enabling environment for their work should be at the core of the discussion in the IGWG and the treaty, including by:
   - Reaffirming the State obligation to protect and support human rights defenders who work on issues of corporate accountability, including from threats by State or non-State actors, and the State obligation to create a safe and enabling environment in which human rights defenders can operate free from hindrance or fear;
   - Reaffirming the obligation of the State to investigate and ensure accountability for any threats and attacks against human rights defenders and others in connection with their work on business and human rights;
   - Reaffirming the obligation of companies to engage with human rights defenders, particularly in the conduct of human rights impact assessments and the development of risk mitigation strategies and programs;
   - Clearly setting out the obligations of business to refrain from interfering with the work of human rights defenders, as well as their responsibility to contribute to the creation of a safe and enabling environment for defenders; and

- Providing for accessible, affordable, prompt and effective judicial and non-judicial remedies for any violations, threats and attacks against human rights defenders and ensure guarantees of non-recurrence.

next Steps

The first session of the IGWG should also be used to discuss, develop, and build consensus on a refined timetable for its continued work under the current mandate, including the broad program of future sessions and inter-sessional work at international, regional and national level.

This should include the possibility of wide-ranging consultations with civil society at national and international level (see section on process, above).

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*Centro Mexicano de Derecho Ambiental, Foundation HELP, ISHR, Plataforma Internacional Contra la Impunidad, Project on Organizing, Development, Education, and Research and Terra de Direitos, NGOs without consultative status, also share the views expressed in this statement.